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IN THE

Supreme Court of the United States

October Term, 1958
No. 166

ROBERT JOHN GROCHOWIAK,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal from the Superior Court of Pennsylvania

MOTION TO DISMISS

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Defendant-Appellant

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COMMONWEALTH OF PENNSYLVANIA,

Plaintiff-Appellee

On Appeal from the Superior Court of Pennsylvania

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss the appeal on the ground that it does not present a substantial federal question.

STATEMENT

On November 8, 1955, the voters of Antrim Township, Franklin County, Pennsylvania, cast ballots on the question of whether motion pictures should be shown on Sunday in the township. The result of the voting was "Yes" 301, "No" 747. The procedure followed was in conformity to the Pennsylvania Act of July 2, 1935, Pamphlet Laws 599, as amended, 4 Pa. Stat. Ann. §§ 59-66, which prohibits the exhibition of motion pictures on Sunday except for those shown after two o'clock postmeridian in localities where the voters have approved such showings.

Subsequently, on June 24, 1956, despite this disapproval by the voters, appellant, manager of an outdoor movie theater in Antrim Township, caused a motion picture to be exhibited. Appellant was arrested for violation of the above statute and found guilty by a Justice of the Peace. He was sentenced to pay a fine of fifty dollars and costs or to serve ter days in the Franklin County jail.

His conviction was affirmed on appeal by the Franklin County Court of Quarter Sessions which held a de novo hearing and also by the Superior Court of Pennsylvania on further appeal. Appellant's petition to the Supreme Court of Pennsylvania to allow an appeal from the judgment of the Superior Court was refused, and this appeal followed.

ARGUMENT

Appellant here calls into question under the Constitution of the United States a provision of Pennsylvania statute law making unlawful the exhibiting of motion pictures on Sunday except insofar as the voters of a particular political subdivision of the state have, by referendum, voted in favor of exhibiting motion pictures after two o'clock postmeridian in that subdivision. The provisions of the federal constitution relied upon by appellant are the First and Fourteenth Amendments. Since the First Amendment imposes no restrictions upon the various states, *Twining v. New Jersey*, 211 U. S. 78 (1908), *Adamson v. California*, 332 U. S. 46 (1947), appellant's reliance must necessarily be upon the Fourteenth Amendment. The latter amendment, however, has made all the guarantees of the First Amendment applicable to the states, *Everson v. Board of Education*, 330 U. S. 1 (1947); and, thus, the issues posed by appellant remain fully for consideration.

1. Appellant first attacks the Pennsylvania statute as violative of the guarantees of free speech and free press. In effect, appellant contends that because expression through motion pictures is protected by these guarantees, the state is powerless to prohibit the showing of motion pictures on Sunday unless authorized by local referendum. In so doing appellant confuses state regulations designed to prevent free expression altogether or in undiluted form, *Martin v. Struthers*, 319 U. S. 141 (1943), *Burstyn v. Wilson*, 343 U. S. 495

(1952), with state regulations which simply forbid certain activities on Sunday without purporting to affect the content or form of the expression. On the other six days of the week appellant is free to exhibit motion pictures as he likes as far as the challenged statute is concerned.

The interest of the state in providing for a day relatively free from public activity for its citizens does not constitute such a restriction of the guarantees of free speech and free press as to violate the Fourteenth Amendment. Whatever limitation occurs does so within the very narrow orbit of a motion picture exhibition only and without censorship or discrimination.

2. No religious preference is created by that provision of the statute, section 6.1, which excepts the exhibition of religious motion pictures by churches on church property from its prohibition. To the contrary, the lack of such an exception might have exposed the statute to attack as interfering with the exercise of religion were it applied to prevent the showing of a religious motion picture in a church. Secondly, the statutory exception simply places religious organizations holding exercises on Sunday in the same position as those holding exercises on any other day of the week. It does not grant them a preference withheld or not enjoyed by organizations celebrating other days. Appellant cannot point to any religious preference or impediment in this section.

Nor does the statute constitute an unconstitutional interference with the religious beliefs of those persons who observe a day other than Sunday as the Sabbath. Sunday laws have long been recognized as civil in

nature regardless of the fact that religious views may have influenced the choice of Sunday as the day of rest. "It is none the less a civil regulation because the day . . . is kept by many under a sense of religious duty." *Hennington v. Georgia*, 163 U. S. 299, 304 (1896). See also *People v. Friedman*, 302 N. Y. 75, 96 N.E. 2d 184 (1950), appeal dism'd 341 U. S. 907 (1951).

3. Appellant next contends that the enforcement of the questioned act by public officials so as to exclude motion pictures exhibited on television constitutes a violation of his right to equal protection of the law. The two cases cited by appellant in this regard, *Philadelphia Retail Liquor Dealers Association et al. v. Pennsylvania Liquor Control Board et al.*, 360 Pa. 269, 62 A. 2d 53 (1948), and *Yick Wo v. Hopkins*, 118 U. S. 356 (1885), however, effectively reveal the fallacy in appellant's contention. The state decision held only that a screen exhibition on television on the premises of an establishment licensed under the Pennsylvania Liquor Control Act of July 18, 1935, Pamphlet Laws 1246, 47 Pa. Stat. Ann. §§ 744-602, now repealed, was a moving picture exhibition so as to require the licensee to obtain an amusement permit from the Pennsylvania Liquor Control Board. This extension of the plenary regulation of an establishment licensed to sell alcoholic beverages occurs in a context far removed from that presented here.

But even assuming that television exhibitions of moving pictures are within the definition of motion picture exhibitions in the law here under attack, the fact that Pennsylvania's police officers have not enforced it against television station managers or

against private home owners who view such exhibitions on their sets hardly presents a systematic pattern of discrimination depriving appellant of his constitutionally guaranteed rights as *Yick Wo v. Hopkins*, supra, requires. Initially, appellant has made no record of such deprivation by state officials except to obtain an admission from a state policeman that the police have not checked private homes on Sunday to see if television sets are being used. It is submitted by appellee that this lack of police activity stems more from the practical impossibility of undertaking such a task than from any deliberate decision to discriminate against appellant. When viewed in light of the act's purpose, this course of action seems perfectly rational. Appellant has no constitutional right to demand that law enforcement officials achieve perfection in the prevention of a certain crime before he can validly be prosecuted for committing such crime. *People v. Oreck et al.*, 74 Cal. App. 2d 215, 168 P. 2d 186, 190 (1946).

Additionally, appellant makes no showing either that any person similarly situated (manager of a movie theater open to the public) has purposely been left free to operate while he has been prosecuted or that he himself has been prosecuted for reasons of race, religion or any other protected status.

4. Appellant's final contention is that the statute involves an unreasonable classification and is thus void under the due process and equal protection clauses of the Fourteenth Amendment. Apparently, this argument is based on three theories: (a) the banning of motion pictures on Sunday, regardless of the necessity of labor or business to conduct them,

bears no reasonable relation to the purpose of providing a day of rest for the public; (b) if providing a day of rest is necessary and proper for legislative action, no reasonable distinction can be made which justifies the allowance of religious motion pictures on church property and regular motion picture exhibitions where approved by the local electorate; and (c) such an exercise of the police power lacks a reasonable basis in view of the many exemptions from Sunday laws contained in other statutes.

The difficulty with appellant's theories is that he would demand perfect harmony and uniformity in order to sustain Sunday legislation. Otherwise, he would require that judicial views as to the wisdom of particular exemptions be substituted for legislative determination. State regulation designed to restrict Sunday activities with reasonable exceptions for recreational, amusement, charitable or necessary activities have long been sustained as valid exercises of the state police power. See *Petit v. Minnesota*, 177 U. S. 164 (1900). The presence of exceptions alone does not invalidate such regulations, and failure to provide such an exception for motion picture exhibitions is likewise not enough to cause the law to fall. Only if the prohibition on motion pictures is unreasonable is the constitution offended. Appellee does not believe that the ban here involved is unrelated to valid considerations of public health, safety, morals or welfare, particularly in the present context of a public exhibition by a commercial enterprise.

The presence of exceptions within the ban on movies for church exhibitions and exhibitions where approved by the local populace are far from unreasonable. As

noted, supra, an attempt to ban religious pictures might well involve the state in a problem of interference with religion. Relaxation of the prohibition where approved locally hardly raises a question of unconstitutional discrimination if the legislative action initially is justifiable. It merely presents a legislative grant of home rule to local political subdivisions, a process becoming more and more used and useful in the administration of local affairs. The referendum method carries this approach to the most democratic extreme, similar to the town meeting. Local determination of such matters cannot, of course, obviate valid constitutional objections; but the use of local referenda should not destroy the validity of otherwise reasonable and proper regulation where the local decision does not itself discriminate.

CONCLUSION

Sunday laws have a long history in the states of this nation and in England. It cannot be claimed that they present a perfect pattern in approach nor a reflection of unanimous public sentiment; but one need hardly describe them as beautiful in their symmetry nor desirable in all their aspects in order to sustain their constitutionality. The Pennsylvania statute prohibiting motion pictures on Sunday presents no features on its face or in its enforcement which are constitutionally objectionable. As short a time ago as 1950 the New York Court of Appeals considered a New York Sunday law in an analogous factual situation and unanimously found no unconstitutional features. *People v. Friedman*, 302 N. Y. 75, 96 N.E. 2d

184 (1950). On appeal this Court dismissed for want of a substantial federal question. 341 U. S. 907 (1951). Nothing has occurred since that decision to give merit to the present appeal or lend substantiality to the questions raised.

For the foregoing reasons appellee moves that this appeal be dismissed.

Respectfully submitted,

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